DESERT OASIS PETROCHEMICAL TRADING LLC v. PEMILIK DAN/ATAU PENCARTER DEMIS KAPAL ATAU VESEL ALPINE MATHILDE (NO IMO 9740471) DARI PELABUHAN HONG KONG

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN J
[ADMIRALTY IN REM NO: WA-27NCC-36-07-2023]
27 OCTOBER 2023

Abstract – *When a sales contract entered into between the parties is an attempt to circumvent sanction laws and regulations, and displays many features which are suspicious and unconventional, it is thus considered a sham and by reason thereof, the claimant has failed to show that it is the lawful owner having title or is a person entitled to possession of and/or having other legal equitable interests in respect of cargo shipped onboard a vessel. In such scenario, a claimant's writ in rem and warrant of arrest of the vessel ought to be set aside, especially when the claimant has acted mala fide and/or crassa negligentia in obtaining the warrant of arrest and in wrongfully arresting the vessel.*

SHIPPING AND NAVIGATION: *Action in rem – Arrest of vessel – Setting aside – Application for – Plaintiff claimed to be person entitled to possession of cargo – Whether sales contract entered into between voyage charterer of vessel and plaintiff sham transaction – Whether plaintiff proved to be lawful owner of vessel – Whether plaintiff could seek security for unquantifiable and non-existent damages – Whether plaintiff acted with mala fide and gross negligent in obtaining warrant of arrest and continuing to arrest vessel – Whether writ in rem and warrant of arrest ought to be set aside*

MARITIME LAW: *Admiralty – Admiralty jurisdiction – Action in rem – Writ in rem and warrant of arrest – Whether admiralty jurisdiction could be enforced – Whether plaintiff had claim in personam – Whether plaintiff acted with mala fide and gross negligent in obtaining warrant of arrest and continuing to arrest vessel*

The defendant, Heroic Serena Inc ('Heroic') was the registered owner of the vessel M/T Alpine Mathilde ('vessel'). The plaintiff, Desert Oasis, purported to be the owner of the cargo of approximately 36 MT Naphtha currently onboard the vessel ('cargo'). The plaintiff alleged that it had 'title' and/or was 'persons entitled to possession of' the cargo and/or had 'other legal or equitable interests in respect of' the cargo. The plaintiff asserted that it had acquired the aforesaid rights pursuant to an unsigned sales contract with Unicious Energy Pte Ltd ('Unicious'), the voyage charterer of the vessel, and was in possession of the original bills of lading issued by the defendant in respect of the cargo. On 25 January 2023, Unicious as sellers

had entered into a sales contract with one Idemitsu International (Asia) Pte Ltd, Japan ('Idemitsu') for the sale of the cargo. For carriage of the cargo to Idemitsu from Singapore to Japan, Unicious entered into a voyage charter party with the defendant ('voyage charter party'). Significantly, the voyage charter party contained the following clauses with the provisions thereunder: (i) BIMCO sanctions clause for Voyage Charter Parties 2020; and (ii) compliance with laws and sanctions clause. The sanctions clause was intended to address two scenarios, namely: (i) where the owners or charterers (or the third parties they were responsible for under the clause) were listed by a sanctioning authority or Government and become subject to sanctions, restrictions, the innocent party had the right to terminate the charter party and claim damages; and (ii) where the trade or activity itself was or became subject to sanctions restrictions, the owners had the right to refuse to perform. The sanctioning authority was defined in the sanctions clause to include the United States of America or any other applicable competent authority or government. The relevant authority or government in this case was the United States of America acting though its Department of the Treasury's Office of Foreign Assets Control ('OFAC') which was the agency charged with administering the United States economic sanctions programs implemented through executive orders issued by the President of the United States. OFAC had authority under the executive orders to impose 'blocking sanctions' on individuals and entities who had engaged in certain sanctionable conduct by designating them on the Specially Designated Nationals and Blocked Persons List ('SDN List'). Coming back to the carriage of the cargo under the voyage charter party, sometime on 9 February 2023, the cargo was loaded on board the vessel and the original bill of lading in three sets were issued by the master of the vessel and made 'to the order of Idemitsu' ('the bills of lading'). However, about six hours after the vessel departed Singapore on the said date, and began her voyage towards Japan to deliver the cargo to Idemitsu, Unicious was designated by OFAC as an SDN. As a result, the voyage charter party's BIMCO Sanctions Clause for Voyage Charter Parties 2020 and Compliance with Laws and Sanctions Clause were invoked. Upon learning of the OFAC's SDN designation, Unicious and Idemitsu decided to cancel their 25 January 2023 sales contract and informed the defendant of their decision through the vessel's commercial managers, Norden A/S ('Norden'). As the defendant was a 'US persons' under the OFAC sanctions and regulations, the designation of Unicious as an SDN caused the cargo to automatically become a blocked property and owing to the blocking sanctions imposed on Unicious, all property in which Unicious had an interest was blocked and the defendant as a 'US persons' was prohibited from having any unauthorised dealings with Unicious, its property, or its property interests. On 14 February 2023, the defendant received a letter *via* Norden from a law firm ('Oon Law') advising that it was acting for Unicious and claiming Unicious as the owners of the cargo. On

15 February 2023, the defendant rejected Unicious's claim and instructions and instead treated Unicious to be in breach of the voyage charter party. The defendant terminated the voyage charter party ('notice of termination') and placed Unicious on notice for any and all damages the defendant would suffer. On 19 April 2023, Oon Law, again on behalf of Unicious demanded that the defendant discharge the cargo in Singapore, otherwise Oon Law would commence legal proceedings against the defendant to compel, discharge, including the arrest of the vessel or associated vessels. In response, the defendant's US sanctions counsel reminded Oon Law that under the voyage charter party with Unicious, Unicious was in breach of the warranty not to become an SDN and that the voyage charter party required the defendant to comply with US laws and regulations, including, and particularly, Sanctions Laws and Regulations. As such, the defendant could not violate US law by delivering the cargo to Unicious (an SDN), as demanded. Despite the plaintiff purportedly entering into the sales contract with Unicious on 6 April 2023 ('sales contract'), the plaintiff only surfaced in this matter more than a month after the date. This was when the plaintiff emailed the defendant's commercial managers, Norden, on 10 May 2023, to claim entitlement to the cargo. The plaintiff simply stated that it had purchased the cargo, that it was demanding the defendant to deliver the cargo to the plaintiff and that it was prepared to tender the original bills of lading dated 9 February 2023. In response, the defendant *via* its commercial managers, Norden, stated that the cargo aboard the Alphine Mathilde to be blocked property. The plaintiff subsequently wrote to the defendant, claiming that the plaintiff was the lawful owner of the cargo, asserting potential losses in the amount of US$25,085,476.26, demanding immediate discharge of the cargo and threatening legal action to seek security in the total sum of US$32,404,188.12 if the defendant failed to comply with the plaintiff's demands. Subsequently, on 4 July 2023, the plaintiff commenced an admiralty arrest action before the High Court of South Africa in Durban for the arrest order of an associated vessel of the plaintiff, the M/T Alpine Mystery, pursuant to the South African Court's 'associated vessel' admiralty arrest procedure. The defendant immediately challenged the order issued in South Africa for the arrest of the defendant's 'associated vessel' M/T Alpine Mystery, by filing an application for reconsideration of the issuance of the arrest order in the first instance on 6 July 2023. On 7 July 2023, the Durban High Court held an urgent hearing which concluded with the court setting aside the original 4 July 2023 order for the arrest of M/T Alpine Mystery. The South African High Court at Durban issued an order vacating the security arrest of the M/T Alpine Mystery, immediately releasing the vessel and ordering the plaintiff to pay costs occasioned, *inter alia*, by the application for reconsideration. Despite the dismissal of the plaintiff's similar admiralty action *in rem* in the Durban High Court, the plaintiff commenced this action *in rem* on 31 July 2023 and on the same day arrested

the defendant's vessel. The plaintiff was seeking enforcement of admiralty jurisdiction of this court by the arrest of the defendant's vessel as security on the basis of a claim for damages against the defendant for a cause of action in conversion of the cargo on board the vessel. The defendant entered an appearance in this action in accordance with the Malaysian Rules of Court 2012. The entry of appearance was strictly without prejudice to the defendant's rights and/or liberties to challenge the admiralty jurisdiction and the issue of validity or regularity of the writ in action *in rem* and/or warrant of arrest. Despite the defendant's repeated without prejudice requests to the plaintiff to accept alternative security by way of a letter of undertaking issued by a reputable international surety subject to OFAC approval for the release of the vessel from arrest, the plaintiff did not respond. As such, the defendant's vessel remained under arrest in this action. *Vide* notice of application (encl. 18), pursuant to O. 12 r. 10 of the Rules of Court 2012 ('ROC') and/or the inherent jurisdiction of this court, the defendant was seeking, *inter alia*, that: (i) the writ *in rem* and warrant of arrest to be set aside in this action; (ii) the vessel Alpine Mathilde be immediately released from arrest in this action; (iii) a declaration that in the circumstances of the case, this court had no *in rem* jurisdiction over the defendant in respect of the subject matter of this suit and/or the relief or remedy sought in this action.

Held (granting orders in favour of defendant):

(1) The sales contract dated 6 April 2023 entered into between the plaintiff and Unicious was nothing more than a sham, as it was an attempt to circumvent the US Sanctions Laws and Regulations as administered by the OFAC. The sales contract was in fact a pretext for Unicious to recover the cargo or its value by using the plaintiff as a proxy. The sales contract itself displayed many features which were suspicious and unconventional because: (i) it was unsigned; (ii) under the payment provision, the plaintiff was not required to make any payment until and after receipt of the cargo; (iii) notwithstanding the aforesaid, Unicious was said to have conveyed the title to the cargo without any payment whatsoever which was most unusual and was not in keeping with any practice of commodity sales; (iv) there was no provision regulating what would happen if the cargo was delivered to the plaintiff but the plaintiff failed to pay Unicious; (v) the sales contract made no provision or reference to the fact that the cargo was subject to the US sanctions, more specifically, the fact that under the sanctions clause, Unicious was unable to deal with the cargo and to transfer the title in the cargo to the plaintiff; and (vi) there was no obligation on the part of Unicious to hand over to the plaintiff the duly endorsed bill of lading to take delivery of the cargo on board the vessel. (paras 55-57)

(2) Although the sales contract was entered into on 6 April 2023, Unicious had on 19 April 2023 continued to assert ownership of the cargo demanding the defendant to discharge the same by 21 April 2023 without any mention of the sales contract. The plaintiff only surfaced to make a claim for the cargo on 10 May 2023, after Unicious' demands against the defendant had not been met. The plaintiff simply stated that it had purchased the cargo, that it was demanding the delivery of the cargo to the plaintiff and that it was prepared to tender the original bills of lading, despite the fact that the plaintiff knew it did not have the bills of lading. The plaintiff did not produce any documentary evidence of any *bona fide* negotiation at arm's length with Unicious at all notwithstanding what appeared as unusual haste in the conclusion of the sales contract. Accordingly, this was not a legitimate transaction and was against public policy. The plaintiff was conspiring with Unicious to perpetrate a deception on this court. Thus, based on the principle of *ex turpi causa non oritur* action, no court should lend its aid to a party who found his cause of action upon an illegitimate act. The plaintiff had not shown that it was the lawful owner having title and/or was a person entitled to possession of and/or having other legal or equitable interests in respect of cargo shipped onboard the vessel. (paras 58-64)

(3) The sales contract did not provide any basis for the plaintiff's claim as the plaintiff had not suffered any loss and/or damages to justify a claim against the defendant. The plaintiff's contract with Unicious allowed no basis for liability because the plaintiff currently owed no money to Unicious and any failure to perform resulting from the embargo would be excused pursuant to the sales contract's *force majeure* clause. The plaintiff had entered into the sales contract with knowledge of the US sanctions, which meant that the plaintiff knew that the defendant would not be able to deliver the cargo, which explained the reason the plaintiff was not obliged to pay Unicious until after the delivery. If the cargo was never delivered, the plaintiff simply suffered no loss or damages. The plaintiff could not seek security for unquantifiable and non-existent damages which it never suffered. Without a quantifiable purchase price, the plaintiff's alleged quantifiable damages in support of its application for security and the arrest of the vessel in this action was illusory and smacked *mala fide*. (paras 65-69)

(4) By virtue of O. 12 r. 10 of the ROC and/or under its own inherent jurisdiction and power, the court was entitled to set aside the plaintiff's writ *in rem* and the warrant of arrest if there was no reasonable cause of action or if the action was vexatious or an abuse of process of court *ie,* the plaintiff's action was plainly or obviously unsustainable. The plaintiff had not shown that it had a claim *in personam* against the

defendant. The admiralty jurisdiction of this court could not be brought or enforced where there was clear evidence that the defendant was not liable *in personam.* As the plaintiff did not have title or was entitled to immediate use and possession of any legitimate basis to demand the cargo, a claim of conversion was simply impossible and non-existent. Further, according to the sales contract between Unicious and the plaintiff, the plaintiff had no obligation to pay for the cargo until after the cargo was delivered to the plaintiff. Therefore, a failure to deliver the cargo to the plaintiff actually prevented any claim whatsoever by Unicious against the plaintiff for payment. The plaintiff had not, and would not, suffer any damages whatsoever until, or unless, the cargo was delivered to it. Thus, the admiralty *in rem* jurisdiction of the court had been wrongly brought by the plaintiff because the defendant was not the relevant person who would be liable on the plaintiff's claim in an action *in personam* under s. 21 of the UK Senior Courts Act 1981. Both the plaintiff's writ *in rem* and warrant of arrest should be set aside. (paras 73-77)

(5) The unsigned sales contract between the plaintiff and Unicious was entered into well after the parties were aware that Unicious was a designated SDN and the cargo on board the vessel was blocked property. It was clearly a sham transaction to circumvent the US sanctions. The plaintiff was already on notice that a competent Durban High Court in exercising its admiralty jurisdiction saw through this sham and yet the plaintiff proceeded again before this court on the exact same facts. Its specious claims were a blatant attempt to mislead this court, after having successfully tried this very same thing in South Africa High Court at Durban. The plaintiff had also intentionally provided illegible copies of the bills of lading, but now admitted that the bills of lading were not in the plaintiff's name nor had they been endorsed to the plaintiff. The plaintiff had acted with *mala fide* and/or *crassa negligentia* (gross negligent) in obtaining the warrant of arrest and arrested and continued to arrest the defendant's vessel. The plaintiff should be ordered to pay for the damages occasioned by the wrongful arrest of the defendant's vessel. (paras 84-90)

Case(s) referred to:

Centro Latino Americano De Commercio Exterior SA v. Owners Of The Ship "Kommunar" (The "Kommunar") (No 3) [1997] 1 Lloyd's Rep 22 ***(refd)***

Harms Bergung Transport v. Harms Offshore AHT "Uranus" [2015] Vol 2 175 ***(refd)***

Jemix Co Ltd & Anor v. Jemix Heat Treatment (M) Sdn Bhd & Ors [2019] 1 LNS 83 HC ***(refd)***

Kawasaki Kisen Kaisha, Ltd v. Owners Of The Ship Or Vessel "Able Lieutenant" [2002] 7 CLJ 478 HC ***(refd)***

Ocean Gain Shipping Pte Ltd v. Owner And/Or Charterer Of Demise Of Vessel Dong Nai Registered At Haiphong Port, Vietnam (The Dong Nai) [1995] 1 LNS 314 HC ***(refd)***

A *Snook v. London And West Riding Investments Ltd [1967] 2 QB 786* ***(refd)***
The "AA V" [1999] SGHC 274 ***(refd)***
The "Bunga Melati 5" [2012] 4 SLR 546 ***(refd)***
The Evangelismos [1858] 12 Moo PC 352 ***(refd)***
The Evmar [1989] 1 LNS 39 ***(refd)***
"The Kommunar (No. 3)" [1997] 1 Lloyd's Rep 22 ***(refd)***
B *The "Vasiliy Golovnin" [2008] 4 SLR(R) 994* ***(refd)***
The "Xin Chang Shu" [2015] SGHC 308 ***(refd)***
Vitol Asia Pte Ltd v. The Owners Of The Ship Or Vessel "Malik Al Ashtar" Of The Port Of Malta; Ing Bank Nv & Anor (Interveners) [2017] 1 CLJ 236 HC ***(refd)***

Legislation referred to:
C Rules of Court 2012, O. 12 r. 10

Senior Courts Act 1981 [UK], ss. 20(2), 21

For the plaintiff - Oon Thian Seng & Lionel Noel; M/s TS Oon & Partners
For the defendant - Mathew Kurien; M/s Sativale Mathew Arun

D *Reported by Suhainah Wahiduddin*

JUDGMENT

Ong Chee Kwan J:

E **Introduction**

[1] Sanctions are political trade restrictions that are imposed to maintain or restore international peace and security or to further a country's foreign policy objectives. The United States, through its Office of Foreign Assets Control ("OFAC") of the US Department of Treasury, has imposed sanctions
F on countries, individuals, vessels and legal entities and various commercial activities.

[2] The US sanctions can generally be divided into two categories. Primary sanctions are those that apply to "US persons" which is defined as US citizens and permanent residents, entities incorporated under the laws of
G the United States, and persons physically located in the United States. Primary sanctions also apply to transactions in US dollars, which transit through the US financial system. Secondary sanctions do not require a "US nexus" and apply to non-US Persons. The aim is to prevent the non-US persons from engaging in transactions against the US national security and
H foreign policy interest by threatening access to US markets.

[3] Whether economic or political in nature, sanctions have a real impact and can affect the interest of those engaged in international shipping. This is one such case where one Unicious Energy Pte Ltd ("Unicious"), the voyage charterer of the vessel, "Alpine Mathilde", being the seller of the cargo
I shipped on board the vessel on route from Singapore to Japan, was designated by OFAC on its Specially Designated National and Blocked Persons ("SDN") List, making it subject to the US sanctions.

[4] Unicious then entered into a sales contract purporting to transfer ownership and/or title in the cargo to the plaintiff.

[5] Based on the purported sales contract and asserting that it has possession of the original bills of lading (which were issued prior to the sales contract), the plaintiff sought and demanded delivery of the cargo from the defendant as the registered owner of the vessel.

[6] Notwithstanding notice of the fact that the defendant is a US person and with Unicious being designated as an SDN and the cargo automatically becomes a "blocked property", the plaintiff proceeded to arrest the vessel.

[7] This judgment deals with the application by the defendant under encl. 18 to set aside the plaintiff's writ *in rem* and the warrant of arrest and for an order that the plaintiff do pay the defendant damages for wrongful arrest.

[8] It is the defendant's case that the purported sales contract is a sham and that in any event, the plaintiff has not suffered any damages to justify invoking the admiralty jurisdiction of this court.

Background Facts

[9] The defendant, Heroic Serena Inc ("Heroic") is the registered owner of the vessel M/T Alpine Mathilde ("the vessel").

[10] The plaintiff, Desert Oasis, purports to be the owner of the cargo of approximately 36 MT Naphtha currently onboard the vessel ("the cargo"). The plaintiff alleged that it has "title" and/or is "persons entitled to possession of the cargo" and/or has "other legal or equitable interests in respect of the cargo".

[11] The plaintiff asserted that it had acquired the aforesaid rights pursuant to an unsigned sales contract dated 6 April 2023 with Unicious and is in possession of the original bills of lading dated 9 February 2023 issued by the defendant in respect of the cargo.

[12] The events leading to the plaintiff becoming the "buyer" for the cargo from Unicious are relevant and it is necessary to allude to the history on the sale of the cargo to appreciate counsel's submissions.

History Of The Cargo

[13] On 25 January 2023, Unicious as sellers entered into a sales contract with one Idemitsu International (Asia) Pte Ltd, Japan ("Idemitsu") for the sale of the cargo.

[14] For carriage of the cargo to Idemitsu from Singapore to Japan, Unicious entered into a voyage charter party with the defendant on 31 January 2023 ("the voyage charter party").

[15] Significantly, the voyage charter party contained the following clauses with the provisions thereunder:

(i) BIMCO sanctions clause for voyage charter parties 2020; and

(ii) compliance with laws and sanctions clause ("the sanctions clause").

[16] The sanctions clause is intended to address two scenarios, namely (i) where the owners or charterers (or the third parties they are responsible for under the clause) are listed by a sanctioning authority or Government and become subject to sanctions restrictions, the innocent party has the right to terminate the charter party and claim damages; and (ii) where the trade or activity itself is or become subject to sanctions restrictions, the owners have the right to refuse to perform.

[17] The "sanctioning authority" is defined in the sanctions clause to include the United States of America or any other applicable competent authority or Government".

[18] It is not in dispute that the relevant authority or Government in the present case is the United States of America acting through its Department of the Treasury's OFAC which is the agency charged with administering the United States economic sanctions programs implemented through executive orders issued by the President of the United States.

[19] OFAC has the authority under the executive orders to impose "blocking sanctions" on individuals and entities who have engaged in certain sanctionable conduct (*eg*, contributions to terrorism, narcotics trafficking, nuclear weapons proliferation, and other security threats) by designating them on the Specially Designated Nationals and Blocked Persons List ("SDN List").

[20] The blocking sanctions that accompany designation on the SDN List have the following three principal consequences:

(i) first, the party designated on the SDN List, as well as any entity that owned 50% or more by the party designated on the SDN List are considered "blocked parties," which means that all of their property and property interests within US jurisdiction or in the custody or control of a US person ("US persons" is defined below), are considered "blocked property" meaning these assets are "frozen." OFAC has explained in its frequently asked question ("FAQ") Number 9 (available at https://ofac.treasury.gov/faqs/9), that when property is blocked/frozen, title to the blocked property remains with the blocked property owner, however, the owner loses the powers and privileges normally associated with ownership of the property, unless authorisation from OFAC is obtained (*ie*, the blocked property cannot be sold, purchased, transferred, or otherwise dealt with unless OFAC grants a license to do so);

(ii) second, US persons are strictly prohibited from all dealings with blocked parties and their blocked property. Violations of this prohibition are subject to civil and criminal penalties;

(iii) third, non-US persons can be targeted with blocking sanctions for engaging in certain transactions with parties on the SDN List.

[21] To put it in another way, the sanctions clause gives rise to a mutual warranty that Unicious, as well as the defendant, would not become a sanctioned party during the pendency of that voyage charter party. In the event either party *ie*, Unicious or the defendant, were to become a sanctioned party (including, but not limited to, becoming an SDN under the US OFAC sanctions), (i) the party designated would be in breach of the voyage charter party; (ii) the non-breaching party would have the right to terminate the charter party; and (iii) the non-breaching party would have the right and legal obligation to comply with any and all laws and sanctions requirements (including US laws and sanctions regulations).

Unicious Designated SDN

[22] Coming back to the carriage of the cargo under the voyage charter party, sometime on 9 February 2023, the cargo was loaded on board the vessel and the original Bill of Lading No E11109 in three sets were issued by the master of the vessel and made "to the order of Idemitsu" ("the bills of lading").

[23] However, about six hours after the vessel departed Singapore on 9 February 2023 and began her voyage towards Japan to deliver the cargo to Idemitsu, Unicious was designated by OFAC as an SDN. As a result, the Voyage Charter Party's BIMCO sanctions clause for Voyage Charter Parties 2020 and compliance with laws and sanctions clause were invoked.

[24] Upon learning of the OFAC's SDN designation, Unicious and Idemitsu decided to cancel their 25 January 2023 sales contract and informed the defendant of their decision through the vessel's commercial managers, Norden A/S ("Norden").

[25] As the defendant is a "US persons" under the OFAC Sanctions and Regulations, the designation of Unicious as an SDN caused the cargo to automatically become blocked property and owing to the blocking sanctions imposed on Unicious, all property in which Unicious has an interest is blocked and the defendant as a "US persons" is prohibited from having any unauthorised dealings with Unicious, its property, or its property interests.

[26] On 14 February 2023, the defendant received a letter *via* Norden, from law firm Messrs Oon & Bazul, LLP Singapore, in association with TS Oon & Partners, Malaysia ("Oon Law"), advising that it was acting for Unicious

A and claiming Unicious as the owners of the cargo. Oon Law further stated that Unicious had provided clear instructions to discharge the cargo back to Horizon Terminal in Singapore and claiming potential damages if the cargo was not discharged by noon Singapore time on 15 February 2023. Oon Law also threatened to arrest the defendant's vessel for security.

B **[27]** On 15 February 2023, the defendant rejected Unicious's claim and instructions and instead treated Unicious to be in breach of the voyage charter party. The defendant (who was left with no choice but to comply with any and all sanctions laws) terminated the voyage charter party ("notice of termination") and placed Unicious on notice for any and all damages the C defendant would suffer.

[28] On 19 April 2023, Oon Law, again on behalf of Unicious, demanded that the defendant discharge the cargo at Horizon Terminal in Singapore, with a deadline for discharge to be completed by close of business on 21 April 2023, otherwise Oon Law would commence legal proceedings D against the defendant to compel discharge, including the arrest of the vessel or associated vessels.

[29] Interestingly, Oon Law's letter of 19 April 2023 made no reference to or stated in any way that Unicious had already, allegedly, entered into the E sales contract for the cargo with Desert Oasis on 6 April 2023, which is dated some 13 days earlier than the 19 April 2023 letter and some 15 days prior to the purported deadline of 21 April 2023 for the defendant to discharge the cargo at Horizon Terminal to Unicious.

[30] In response, the defendant's US sanctions counsel, K&L Gates, LLP, F reminded Oon Law that under the voyage charter party with Unicious, Unicious was in breach of the warranty not to become an SDN and that the voyage charter party required the defendant to comply with US laws and regulations, including, and particularly, Sanctions Laws and Regulations. As such, the defendant could not violate US law by delivering the cargo to G Unicious (an SDN), as demanded.

[31] In the meantime, on 12 April 2023, the defendant's commercial managers, Norden, received an inquiry from Idemitsu regarding the original bills of lading. In this communication, Idemitsu confirmed that the original bills of lading remained with Unicious and that Unicious had asked Idemitsu H to endorse the bills of lading to a third party. It is common ground that Idemitsu never endorsed the original bills of lading.

Appearance Of Plaintiff

[32] Despite the plaintiff purportedly entering into the sales contract with Unicious on 6 April 2023 ("the sales contract"), the plaintiff only surfaced I in this matter more than a month after the date. This was when the plaintiff emailed the defendant's commercial managers, Norden, on 10 May 2023 to claim entitlement to the cargo.

[33] *Vide* the said email of 10 May 2023, the plaintiff simply stated that it had purchased the cargo, that it was demanding the defendant to deliver the cargo to the plaintiff and that it was "prepared to tender the 3/3 set of original bills of lading dated 9 February 2023 ...". A

[34] In response, the defendant, *via* its commercial managers, Norden, stated on 10 May 2023 (time zone difference – 9 May 2023) as follows: B

> The U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") considers the cargo aboard the Alphine Ma Thilde to be blocked property. Even if Unicious sold the cargo to Desert Oasis, *the cargo would remain blocked until OFAC granted a petition to unblock this property*. In such circumstances, *OFAC will not permit Owners to transfer or sell the Cargo to a third party unless the sale proceeds are deposited into a blocked account.* C
>
> (emphasis added)

[35] No additional or further communications were received directly from the plaintiff until nearly two months later, on 30 June 2023, when Hong Kong counsel, acting on behalf of the plaintiff, wrote to the defendant's commercial managers, Norden, claiming that the plaintiff was the "lawful owner" of the cargo, asserting potential losses in the amount of US$25,085,476.26, demanding immediate discharge of the cargo and threatening legal action to seek security in the total sum of US$32,404,188.12 (the potential losses noted above, plus an exorbitant amount of costs, fees and interest) if the defendant failed to comply with the plaintiff's demands. D E

[36] Despite the defendant's US counsel explanation, in detail, of the reasons why Unicious was not capable of selling the blocked property (two months after being designated an SDN and the property becoming blocked), as well as why the defendant could not deliver blocked property to any third party without a license or permission from OFAC and also challenging the veracity of the plaintiff's claim as a *bona fide* purchaser of the cargo, neither the plaintiff nor its Hong Kong counsel responded. F

[37] Instead, the plaintiff proceeded with the filing of an associated vessel arrest in the High Court Durban, South Africa against the vessel M/T Alpine Mystery in early July 2023. G

Proceeding In Africa

[38] On 4 July 2023, the plaintiff commenced an admiralty arrest action before the High Court of South Africa in Durban for the arrest order of an associated vessel of the plaintiff, the M/T Alpine Mystery, pursuant to the South African Court's "associated vessel" admiralty arrest procedure. H

[39] The defendant immediately challenged the order issued in South Africa for the arrest of the defendant's "associated vessel", M/T Alpine Mystery, by filing an application for reconsideration of the issuance of the arrest order in the first instance on 6 July 2023. I

[40] On 7 July 2023, the Durban High Court held an urgent hearing, which concluded with the court setting aside the original 4 July 2023 order for the arrest of M/T Alpine Mystery. The South African High Court at Durban issued an order vacating the security arrest of the M/T Alpine Mystery, immediately releasing the vessel and ordering the plaintiff to pay the "costs occasioned by the application for reconsideration, including the costs consequent upon the employment of senior counsel" for the owners of the associated vessel, Alpine Mystery.

Action *In Rem* And Arrest Of Vessel In This Action

[41] Despite the dismissal of the plaintiff's similar admiralty action *in rem* in the Durban High Court, the plaintiff commenced this action *in rem* on 31 July 2023 and, on the same day, arrested the defendant's vessel at the PTP anchorage, Johor.

[42] The plaintiff's claim against the defendant as endorsed in the plaintiff's writ in action *in rem* is that "the plaintiff as lawful owners having title and/or persons entitled to possession of and/or having other legal or equitable interests in respect of a cargo of approximately 36,259.858 MT of Naphtha shipped onboard the vessel for carriage from Singapore to Japan under Bill of Lading No. E11109, claim against the defendant as carriers and/or persons being in physical possession of the cargo, damages for failure to deliver and/or unlawful detention and/or conversion of the cargo, together with interest and costs."

[43] As can be seen, the plaintiff in effect is seeking enforcement of admiralty jurisdiction of this court by the arrest of the defendant's vessel as security on the basis of a claim for damages against the defendant for a cause of action in conversion of the cargo on board the vessel.

[44] It is not disputed that the vessel's statutory documents were taken by the sheriff from the vessel during the arrest of the vessel on 31 July 2023 for safekeeping, pending release.

[45] The defendant entered an appearance in this action on 2 August 2023 in accordance with the Malaysian Rules of Court 2012. The entry of appearance is strictly without prejudice to the defendant's rights and/or liberties to challenge the admiralty jurisdiction and the issue of validity or regularity of the writ in action *in rem* and/or warrant of arrest.

[46] Despite the defendant's repeated without prejudice requests to the plaintiff or its solicitors to accept alternative security by way of a letter of undertaking issued by a reputable international surety subject to OFAC approval for the release of the vessel from arrest, the plaintiff or its solicitors have not responded to date.

[47] As such, the defendant's vessel remains under arrest in this action (*ie*, from the date of arrest on 31 July 2023 and continuing).

Application Under encl. 18

[48] *Vide* notice of application dated 8 August 2023 (encl. 18) pursuant to O. 12 r. 10, Rules of Court 2012 and/or the inherent jurisdiction of this court, the defendant is seeking for the following orders and/or reliefs:

(i) the writ *in rem* and warrant of arrest both dated 31 July 2023 be set aside in this action;

(ii) the vessel "Alpine Mathilde" (IMO No: 9380506) registered at the Port of Hong Kong be immediately released from arrest in this action;

(iii) a declaration that in the circumstances of the case, this court has no *in rem* jurisdiction over the defendant in respect of the subject matter of this suit and/or the relief or remedy sought in this action;

(iv) any alternative security (if any) given by the defendant to the plaintiff shall be returned to the solicitors for the defendant within two days from the date of the order to be made herein;

(v) all and any vessel's statutory documents, taken by the plaintiff/sheriff from the vessel during the arrest of the vessel on 31 July 2023 for safekeeping, shall be returned to the solicitors for the defendant within 24 hours from the date of the order to be made herein;

(vi) the plaintiff do pay to the defendant damages for wrongful arrest and/or wrongful continuation of arrest of the defendant's vessel together with damages for wasted expenses, such to be assessed by the High Court Deputy Registrar;

(vii) all other applications by the plaintiff or hearing thereof in relation to the vessel or cargo on board the vessel shall be stayed pending the hearing and final determination of this application;

(viii) the costs of the application and including incidental to this application be paid by the plaintiff to the defendant on an indemnity basis; and

(ix) further orders and/or such other reliefs as this Honourable Court deems fit, just and equitable in the circumstances of the case.

Court's Deliberations

[49] The defendant has adduced its expert evidence pertaining to the US sanctions laws. The plaintiff has not challenged or disputed the defendant's expert evidence and has not tendered any contrary expert opinion in this application.

[50] The plaintiff is also not disputing that Unicious is designated on the OFAC's SDN List and/or that the defendant is a "US persons" and/or that the cargo is a blocked property subject to the blocked sanctions.

[51] In the present *in rem* action, the plaintiff based its right to bring the action *in rem* against the vessel on the claims that:

(i) the plaintiff is the lawful owner having title and/or persons entitled to possession of and/or having other legal or equitable interests in respect of cargo shipped onboard the vessel;

(ii) the plaintiff has sustained damages for the defendant's failure to deliver and/or unlawful detention and/or conversion of the cargo.

[52] In respect of the claims as the lawful owner of the cargo, the plaintiff has abandoned its reliance as holder of the original bills of lading, conceding that the bills of ladings were never endorsed by Idemitsu and, therefore, they remain stated "to the order of Idemitsu".

[53] Instead, the plaintiff is claiming that it has acquired ownership of the cargo from the former owner, Unicious, by virtue of the unsigned sales contract dated 6 April 2023 between them.

[54] The plaintiff claimed that it is entitled to the delivery of the cargo from the defendant because it is now the owner of the cargo and the defendant cannot refuse delivery even if Unicious (the seller of the cargo) was placed on the OFAC's SDN List on 9 February 2023. It is contended that there is no legal basis to refuse based upon the US sanctions law. The plaintiff further contended that the determination and dismissal of the plaintiff's action for similar claim, reliefs and arrest against the defendant's associated vessel "Alpine Mystery" arising from the same alleged cause of action by the Durban High Court is irrelevant in this action.

Sales Contract Dated 6 April 2023

[55] With respect to the plaintiff, I find the sales contract to be nothing more than a sham, entered into between the plaintiff and Unicious as an attempt to circumvent the US sanctions laws and regulations as administered by OFAC. I accept the defendant's contention that the sales contract is, in fact, a pretext for Unicious to recover the cargo or its value by using the plaintiff as a proxy.

[56] Unicious makes clear by its own affidavit *vide* sabil affidavit (encl. 10 at para. 14) that Unicious had approached the plaintiff about entering into this contract because "it was not possible to procure a buyer given Unicious was subject to US OFAC sanctions". Yet, no reasons have been proffered by the plaintiff as to why it agreed to buy the cargo that it knows is subject to the US sanctions and is a blocked property.

[57] The sales contract itself displays many features which are suspicious and unconventional. In particular: A

(i) the sales contract is unsigned;

(ii) under the payment provision, the plaintiff is not required to make any payment until after receipt of the cargo; B

(iii) notwithstanding the aforesaid, Unicious is said to have conveyed the title to the cargo without any payment whatsoever which is most unusual and is not in keeping with any practice of commodity sales;

(iv) there is no provision regulating what happens if the cargo is delivered to the plaintiff but the plaintiff fails to pay Unicious; C

(v) the sales contract omits to state a discharge location for the cargo;

(vi) the sales contract makes no provisions or reference to the fact that the cargo is subject to the US sanctions, more specifically, the fact that under the sanctions clause, Unicious is unable to deal with the cargo and to transfer the title in the cargo to the plaintiff; D

(vii) there is no obligation on the part of Unicious to hand over to the plaintiff the duly endorsed bills of lading to take delivery of the cargo on board the vessel.

E

[58] Apart from the aforesaid strange and curious terms of the sales contract, the circumstances surrounding the same also bear mention:

(i) although the sales contract was entered into on 6 April 2023, Unicious had on 19 April 2023 continued to assert ownership of the cargo demanding the defendant to discharge the same by 21 April 2023 without any mention of the sales contract; F

(ii) the plaintiff only surfaced to make a claim for the cargo on 10 May 2023, after more than a month from the sales contract and after Unicious' demands against the defendant had not been met. *Vide* email of 10 May 2023, the plaintiff simply stated that it had purchased the cargo, that it was demanding the defendant delivery of the cargo to the plaintiff and that it was "prepared to tender the 3/3 set of original bills of lading dated 9 February 2023 ...". This was despite the fact that the plaintiff knew that it did not have the bills of lading duly endorsed by Idemitsu; G H

(iii) the plaintiff did not produce any documentary evidence of any *bona fide* negotiation at arm's length with Unicious at all notwithstanding what appears as unusual haste in the conclusion of the sales contract. Given the well-publicised relationship between Unicious and the plaintiff that Unicious has regularly purchased oil from the plaintiff for which I

Unicious is accused of "coordinating millions of dollars in petroleum-related payments for other companies within the network and aiding Triliance", in circumvention of US sanctions regulations, such documentary evidence on the negotiations become all the more pressing;

(iv) both Unicious and the plaintiff are represented by the same counsel and law firm at all times.

[59] Notwithstanding the many suspicious and questionable points raised on the sales contract, the plaintiff conspicuously failed to respond to the same to demonstrate the *bona fide* of the transaction.

[60] Accordingly, I accept the submission of learned counsel for the defendant, Mr Mathew Kurien that the aforesaid can only lead to one explanation *ie*, this is not a legitimate transaction and is against public policy and that the plaintiff is conspiring with Unicious to perpetrate a deception on this court. Thus, based on the principle of *ex turpi causa non oritur* action, no court should lend its aid to a party who found his cause of action upon an illegitimate act.

[61] The *locus classicus* definition of a sham transaction is found in the speech of Diplock LJ in the case of *Snook v. London And West Riding Investments Ltd* [1967] 2 QB 786:

> As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a "sham," it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, *it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.* But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v. Maclure* 15 and *Stoneleigh Finance Ltd. v. Phillips*), 16 that for acts or documents to be a "sham," with whatever legal consequences follow from this, *all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived.* (emphasis added)

[62] A claim that a transaction is a sham is a serious allegation. Sham, however, does not mean fraud. The standard of proof for sham transaction was explained by the High Court Judge in *Kawasaki Kisen Kaisha, Ltd v. Owners Of The Ship Or Vessel "Able Lieutenant"* [2002] 7 CLJ 478; [2002] 6 MLJ 433 case as follows:

> The plaintiff had always maintained that the purported transfer of beneficial ownership was a sham and nowhere in plaintiff's affidavits or submission of counsel had the plaintiff alleged fraud. Contrary to the

contention by both, the defendant and Pan Ocean, *'sham' did not mean 'fraud' and hence, the plaintiff had to only prove sham on a balance of probabilities and not beyond reasonable doubt. Sham transactions in the context of the present case meant that the sale was not genuine, for example, a sale of convenience.* In the instant case, the defendant's sale of the said vessel for USD3m smacked of a sham because the defendant continued to retain the mortgage debt of USD9.5m on the said vessel. (emphasis added)

[63] In *Jemix Co Ltd & Anor v. Jemix Heat Treatment (M) Sdn Bhd & Ors* [2019] 1 LNS 83; [2019] 2 MLRH 276, the High Court took into account the "unholy haste" in the conclusion of sale and purchase agreement for shares entered between the defendants in question in finding that it was a sham agreement. Wong Kian Kheong J (as he then was) stated:

I find as a fact that the SPA is a sham agreement for the following reasons:

(i) *the "unholy haste" in the conclusion of the SPA (17 days after the 2nd Defendant's Denial) shows a lack of bona fides on the part of the 2nd Defendant;*

(ii) *there is no documentary evidence of any bona fide negotiation at arm's length between the 2nd and 4th Defendants prior to the conclusion of the SPA;*

(iii) there is no written proof regarding PCS's valuation fee and its payment by the 2nd and/or 3rd Defendants;

(iv) no evidence of offer and acceptance by the 2nd and 4th Defendants (which led to the SPA) has been tendered in this case;

(v) *the SPA had been prepared by Messrs BPL and yet, no draft SPA has been exchanged and discussed between Messrs BPL (acting for the 2nd Defendant) and the 4th Defendant;*

(vi) after the execution of the SPA, there was no correspondence between the 2nd and 4th Defendants regarding the completion of the SPA;

(vii) clause 3.1 of the SPA provided that the consideration for the 4th Defendant's purchase of the 2nd Defendant's Shares was RM2,000,000.00 (Purchase Consideration) which was *"payable wholly in cash". ... The 2nd Defendant did not tender any evidence that the 4th Defendant had paid the Purchase Consideration and yet, the 2nd Defendant's Shares had been transferred to the 4th Defendant!* The SPA is clearly a sham contract because the 2nd Defendant's Shares had been transferred to the 4th Defendant despite a breach of Clauses 3.2 and 5.1 (4th Defendant's Breach). The 4th Defendant even received interim dividends amounting to RM156,800.00 from the 1st Defendant; (emphasis added)

[64] Accordingly, based on the authorities and the factual circumstances of this case as enumerated above, it is my judgment that the sales contract is a sham and by reason thereof, the plaintiff has not shown that it is the lawful owner having title and/or is a person entitled to possession of and/or having other legal or equitable interests in respect of cargo shipped onboard the vessel.

Plaintiff Sustained No Loss

[65] Further, quite apart from the issue of ownership and title to the cargo under the sales contract, I also agree with the findings of the Honourable Justice Bedderson of the Durban High Court that the sales contract, in fact does not provide any basis for the plaintiff's claim as the plaintiff has not suffered any loss and/or damages to justify a claim against the defendant.

[66] The Durban High Court rightly reasoned that the plaintiff's contract with Unicious allows no basis for liability because the plaintiff currently owes no money to Unicious and any failure to perform resulting from the embargo would be excused pursuant to the sales contract's *force majeure* clause. The plaintiff had entered into the sales contract with knowledge of the US sanctions, which means that the plaintiff knew that the defendant would not be able to deliver the cargo. This explains the reason the plaintiff is not obliged to pay Unicious until after delivery.

[67] The Durban High Court explicitly concluded that "it is clear from the contract of sale that (Desert Oasis) only became liable for payment of the purchase price of the cargo three working days after completion of discharge." In other words, if the cargo is never delivered, the plaintiff simply suffers no loss or damages, period. "The alternative claim for damages can only arise once the applicant has paid for the cargo." Accordingly, the plaintiff admits (there in Durban High Court and here), as it must, that it has not paid for the cargo.

[68] Even if liability could arise under the sales contract, the plaintiff has no way to quantify its damages, where, as aptly noted by the Durban High Court, "the purchase price for the cargo was subject to, *inter alia,* the quality and quantity being mutually agreed upon as per the published selling rate which was still to be determined as set out in cls. 13 and 15 of the contract of sale." The plaintiff cannot seek security for unquantifiable and non-existent damages, which it never suffered. Following from the Durban High Court's judgment, the plaintiff's feigned attempt at "setting" a purchase price in this matter is misplaced, and inconsistent with the terms of its sales contract with Unicious.

[69] The Durban High Court agreed that "there is no *prima facie* evidence to support the plaintiff's alleged claim of the purchase price of the cargo in question, which in turn has a direct bearing on the amount of security it seeks

in this application." Simply put, without a quantifiable purchase price, the plaintiff's alleged quantifiable damages in support of its application for security and the arrest of the vessel in this action is illusory and smacks of *mala fide*.

[70] If the plaintiff never takes delivery, it never has an obligation to pay for the cargo and therefore plaintiff has no basis upon which it can suffer or claim damages for which it now wrongfully seeks security, of which it previously sought security (unsuccessfully) in the Durban High Court.

Ingredients For Admiralty Jurisdiction Of High Court Not Satisfied

[71] For the plaintiff to come within the admiralty jurisdiction of this court and to arrest the vessel, the plaintiff must satisfy in the affidavit leading to warrant of arrest, five essential steps succinctly set out by the Singapore Court of Appeal in *The "Bunga Melati 5"* [2012] 4 SLR 546:

(i) show that it has a claim under s. 20(2) of the UK Senior Courts Act 1981 ('step 1');

(ii) show that the claim arises in connection with a ship ('step 2');

(iii) identify the person who would be liable on the claim in an action *in personam* (*ie*, the *in personam* liability requirement) ('step 3');

(iv) show that the relevant person was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship ('step 4');

(v) show that the relevant person was, at the time when the action was brought: (i) the beneficial owner of the offending ship in respect of all the shares in it or the charterer of that ship under a demise charter; or (ii) the beneficial owner of the sister ship as respects all shares in it ('step 5').

[72] *The Bunga Melati 5* tests have been cited approvingly even in the UK, most recently by the Queen's Bench Division (admiralty court) in *Harms Bergung Transport v. Harms Offshore AHT "Uranus"* [2015] Vol 2 175. This was also accepted and applied in the Malaysian context in the case of *Vitol Asia Pte Ltd v. The Owners Of The Ship Or Vessel "Malik Al Ashtar"* [2017] 1 CLJ 236.

[73] It is not disputed that this court is entitled by virtue of O. 12 r. 10 of the Rules of Court 2012 and/or under its own inherent jurisdiction and power, to set aside the plaintiff's writ *in rem* and the warrant of arrest if there is no reasonable cause of action or if the action is vexatious or an abuse of process of court *ie*, the plaintiff's action is plainly or obviously unsustainable.

[74] In the present case, the plaintiff has not shown that it has a claim *in personam* against the defendant. The admiralty jurisdiction of this court cannot be brought or enforced where there is clear evidence that the defendant is not liable *in personam* – see: *The "AA V"* [1999] SGHC 274:

> ... where there is clear evidence before the court that the defendant sued is not liable *in personam* because he is not a party to the contract sued on, the admiralty jurisdiction of the court cannot be invoked ...

[75] As the plaintiff does not have title or entitled to immediate use and possession or any legitimate basis to demand the cargo, a claim of conversion is simply impossible and non-existent.

[76] Further, according to the sales contract between Unicious and the plaintiff, the plaintiff has no obligation to pay for the cargo until after the cargo is delivered to the plaintiff. Therefore, a failure to deliver the cargo to the plaintiff actually prevents any claim whatsoever by Unicious against the plaintiff for payment. The plaintiff has not, and will not, suffer any damages whatsoever until, or unless, the cargo is delivered to it.

[77] This means that the admiralty *in rem* jurisdiction of the court has been wrongly brought by the plaintiff because the defendant is not the relevant person who would be liable on the plaintiff's claim in an action *in personam* under s. 21 of the UK SCA 1981. It follows that both the plaintiff's writ *in rem* and warrant of arrest should be set aside as the plaintiff has failed to satisfy the requirement under s. 21.

Damages For Wrongful Arrest

[78] The defendant has prayed for damages against the plaintiff for the arrest of the vessel on the ground that it is wrongful and an abuse of court process given that the plaintiff does not have a good faith claim against the defendant.

[79] It is trite that the defendant is entitled to damages for a wrongful arrest of vessel in the plaintiff's exercise of admiralty jurisdiction if this court finds that the arrest is brought with so little colour or with so little foundation, that it implies malice or gross negligence.

[80] The test to be applied in deciding whether or not to order an inquiry as to damages for the wrongful arrest of a ship is succinctly encapsulated by the Privy Council in *The Evangelismos* [1858] 12 Moo PC 352:

> ... is there or is there not, reason to say, that the action was so unwarrantedly brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the plaintiff, or that gross negligence which is equivalent to it?

[81] This was also reaffirmed in *Ocean Gain Shipping Pte Ltd v. Owner And/Or Charterer Of Demise Of Vessel Dong Nai Registered At Haiphong Port, Vietnam (The Dong Nai)* [1995] 1 LNS 314; [1996] 4 MLJ 454 where Abdul Malik Ishak J in the High Court found as follows:

> An application to set aside the warrant of arrest meant that the defendants were alleging wrongful arrest and wrongful continuance of the arrest their ship. Therefore, the appropriate test to be applied was whether there was *mala fides* or *crassa negligentia* implying malice on the part of the plaintiffs. On the evidence tendered, the court found that malice had been established against the plaintiffs. Hence, the arrest of the Dong Nai was in fact wrongful (see p 466A-D; *The Evangelismos* (1858) 12 Moo PC 352 and *The Euroexpress* [1988] 3 MLJ 367 followed).

[82] In the case of *Centro Latino Americano De Commercio Exterior SA v. Owners Of The Ship "Kommunar" (The "Kommunar") (No 3)* [1997] 1 Lloyd's Rep 22, the terms "*crassa negligentia*" and "gross negligence" are stated as follows:

> Two types of cases are thus envisaged. Firstly, there are cases of *mala fides*, which must be taken to mean those cases where on the primary evidence the arresting party has no honest belief in his entitlement to arrest the vessel. Secondly, *there are those cases in which objectively there is so little basis for the arrest that it may be inferred that the arresting party did not believe in his entitlement to arrest the vessel. It is, as I understand the judgment, in the latter sense that such phrases "crassa negligentia" and "gross negligence" are used and are described as implying malice or being equivalent to it* ... (emphasis added)

[83] It should be noted that the remedy of arrest is not something that can simply be invoked without consequence. The case *Of The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 is particularly instructive in this regard:

> The arrest of a vessel is never a trifling matter. Arrest is a very powerful invasive remedy. An arrest of a ship can lead to tremendous inconvenience, financial distress and severe commercial embarrassment. Even the briefest of delays can sometimes cause significant losses. It can also in certain *instances prejudice the livelihood of the ship's crew and the* commercial fortunes of the shipowner. *Maritime arrests can, when improperly executed, sometimes be as destructive as Anton Piller orders an even as potentially ruinous as Mareva injunctions, the two nuclear weapons of civil litigation.* (emphasis added)

[84] In the present case, the unsigned sales contract between the plaintiff and Unicious was entered into well after the parties were aware that Unicious was a designated SDN and the cargo on board the vessel was blocked property. It was clearly a sham transaction to circumvent the US sanctions.

[85] The plaintiff was already on notice that a competent Durban High Court in exercising its admiralty jurisdiction saw through this sham and yet the plaintiff proceeded again before this court on the exact same facts. In fact,

its specious claims are a blatant attempt to mislead this court, after having unsuccessfully tried this very same thing in South Africa High Court at Durban.

[86] The plaintiff asserted in this court, like in the Durban High Court, that it would be in a position to present the original bills of lading and went further to claim that mere possession was sufficient to establish title, because, in its circular logic, "the holder of the original bills of lading is the party which is entitled to delivery of the cargo as it holds the title by virtue of being the holder of the bills of lading".

[87] In this regard, the plaintiff has intentionally provided an illegible copy of the bills of lading, but now admits that the bills of lading are not in plaintiff's name nor have they been endorsed to the plaintiff.

[88] Although at the hearing of encl. 18, the plaintiff has refrained from asserting the position that mere possession of a bills of lading alone, without being named or endorsed therein, is sufficient to entitle a party to delivery, this was stated and relied upon as a basis in the arrest of the vessel.

[89] Steven Chong J (as he then was) in the Singapore High Court case of *The "Xin Chang Shu"* [2015] SGHC 308, observed the policy and the principles of law relating to damages for wrongful arrest of vessel, as follows:

> 1. The law on wrongful arrest was developed to protect shipowners against malicious arrests or arrests brought with "so little colour" or "so little foundation" that implies malice on the part of the arresting party.
>
> 2. Proof of actual malice is often difficult to establish, especially at the interlocutory stage, where most applications for wrongful arrest are pursued. However, the malice threshold can be satisfied by inference in circumstances where the case is so hopelessly bereft of merit that it warrants a finding that the claim is seriously lacking in "colour" or "foundation".
>
> 3. Ship arrest is an extremely draconian remedy. It can be very disruptive and may inflict severe economic hardship on the shipowner's trade and operations. In order for the protection against this draconian measure to be meaningful and effective, the judicial threshold should not be set too high so as to render the right to damages practically illusory.
>
> 4. In appropriate cases, where the threshold has been crossed, the court should express its opprobrium towards the arresting party's conduct by ordering it to be accountable for the damages occasioned by its wrongful arrest. Indeed, our courts have in a number of cases held the arresting party accountable for wrongful arrest.
>
> ...

Principles governing the law on wrongful arrest

27 In *The Vasiliy Golovnin* at [134], the Court of Appeal affirmed the long-standing test set out in *The Evangelismos* (1858) 12 Moo PC 352; 14 ER 945 ("*The Evangelismos*") (at 359; 948):

> Undoubtedly there may be cases in which there is either *mala fides*, or that *crassa negligentia*, which implies malice, which would justify a Court of Admiralty giving damages, as in an action brought at Common law damages may be obtained. ...
>
> The real question in this case ... comes to this: is there or is there not, reason to say, that the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff, or that gross negligence which is equivalent to it?

28. Elaborating on the "focus or emphasis" of the inquiry under the two parts to *The Evangelismos* test, the Court of Appeal held at [137]:

> ... Focusing on the first part of the passage ... would mean that the inquiry would be both an objective and a subjective one into the plaintiff's state of mind at the time of the arrest as there would be a need to establish if the plaintiff had a genuine and honest belief that the arrest was legitimate then. On the other hand, if the focus is on the second part of the passage, this would mean a more objective inquiry into the circumstances prevailing and the evidence available at the time of the arrest, so as to determine if the action and the arrest were so unwarrantably brought, or brought with so little colour, or so little foundation, as to imply that they were brought with malice or gross negligence ... (emphasis added)

29. The court then held that the inquiry should generally be focused on the second part of *The Evangelismos* test, *ie*, "whether the action and the arrest were so unwarrantably brought, or brought with so little colour, or so little foundation, as to imply malice or gross negligence on the plaintiff's part" (*The Vasiliy Golovnin* at [137]).

30. It thus appears that the test is ultimately premised on a finding of malice (see also, *The Kiku Pacific* at [30]). Malice may be found on the basis of direct evidence of the plaintiff's state of mind at the time of the arrest, or it can be inferred if the claim is so unmeritorious that the arresting party could not have honestly believed that he had an entitlement to arrest the vessel (or at least recklessly disregarded whether he had grounds to do so).

31. Specifically, the action or arrest may be considered to have been brought "unwarrantably" or with "little colour" or with "little foundation" where, *inter alia* there is "material non-disclosure in the affidavit in support of the warrant of arrest", or where "the writ of summons does not disclose a reasonable cause of action" (*The Vasiliy Golovnin* at [138]). Given that the defendant has, in the present case, relied on both these grounds to seek damages for wrongful arrest, it is helpful to consider them in some detail.

A ...

37. Notwithstanding the high threshold of *The Evangelismos* test, it can be seen that our courts would not be slow to find wrongful arrest and to award damages in appropriate circumstances. Indeed, this sentiment was expressed by the Court of Appeal in *The Vasiliy Golovnin* at [135]. From the above cases, it is clear that the court will pay particular attention to what the arresting party knew, or must have known, at the time of the arrest (see [34] and [36] above). Where facts which clearly undermine the plaintiff's claim, and consequently, its right of arrest are known or must have been known to the plaintiff at the time of the arrest, the courts will be more inclined to award damages for wrongful arrest.

38. In this regard, the question as to how weak a claim must be before malice can be inferred is perhaps a question that cannot be comprehensively answered in every case by a single threshold test. While the courts have held that malice may be inferred if the claim is without colour or foundation, what that means in practice is inevitably a matter of judgment, and can only be determined by the court on the facts of each case.

39. I would add at this juncture that because the focus of the inquiry is on malice of the arresting party, special attention should be paid to what the arresting party knew or must have known at the time of the arrest. While this is not the only factor the court should consider, it is certainly an important one in evaluating the merits of the claim for wrongful arrest. If, based on the information available, the court finds that the arresting party knew or must have known that it had no reasonable or probable cause to arrest the vessel, the court may well be justified in awarding damages for wrongful arrest. By contrast, if the court only arrives at the finding that the arresting party had no reasonable or probable cause to arrest the vessel after a legal analysis of the jurisdictional basis of the claim (as in the case of *The Inai Selasih*), or based on documents or information which were not available to the arresting party at the time of the arrest, the judicial finding in such circumstances may not be a sufficient basis for an award of damages.

40. While *The Kiku Pacific* did reject the use of the phrase "reasonable or probable cause" (see [32] above), it did so, in my view, in the context of counsel's submission that an absence of a reasonable or probable cause alone can be sufficient to give rise to an inference of malice (see *The Kiku Pacific* at [18]). I accept that the absence of a reasonable or probable cause alone would not normally be sufficient to give rise to a finding of malice. However, if the court finds not only that there was no reasonable or probable cause for the arrest, but also that the arresting party knew or must have known that it did not have reasonable or probable cause at the time of the arrest, malice may be inferred and damages for wrongful arrest accordingly awarded.

I

> 42. Thus, to conclude, a claim that is "so unwarrantably brought, or brought with so little colour, or so little foundation" may alone be sufficient to justify a finding of malice, regardless of the arresting party's subjective state of mind at the time of the arrest. The finding of malice would be made even more compelling in circumstances where the court determines that the arresting party knew or must have known that it had no reasonable cause of action when arresting the vessel. Malice, however, remains the centrepiece of the inquiry, and a finding of malice is ultimately a fact-sensitive exercise.

[90] Based on the aforesaid governing principles on the law of wrongful arrest and based on the facts and circumstances as stated above, it is the judgment of this court that the plaintiff has acted with *mala fides* and/or *crassa negligentia* (gross negligent) in obtaining the warrant of arrest and arrested and continued to arrest the defendant's vessel.

[91] I would add that the plaintiff has persisted with the arrest of the defendant's vessel even though the defendant, on a strictly without prejudice basis, had offered to provide alternative security *via* an international surety. The plaintiff was unreasonable and had acted in *mala fide* in rejecting the defendant's offer of an alternative security to secure immediate release of vessel from arrest; delay in providing information on the amount of security required for the release of the vessel and excessive demand of quantum security by the plaintiff for release of the vessel, all of which had prolonged the wrongful continued arrest of the vessel at Port of Tanjung Pelepas, Johor to the detriment of the defendant (for nearly two months).

[92] In the *The Evmar* [1989] 1 LNS 39; [1989] 2 MLJ 460, it was held that a refusal to accept a protection and indemnity club undertaking to release of vessel from arrest tantamounted to malicious negligence:

> **29 The only question is whether the fact that the defendants** agreed to **furnish the letter of undertaking "under protest"** gave the plaintiffs a reasonable cause not to release the vessel. It seems to me that that expression meant, in the context, no more than that the defendants were reserving their rights, which they were entitled to do. In my opinion since alternative security had been furnished to the plaintiffs in terms which the plaintiffs had asked for, the plaintiffs had no further reasons not to release the vessel. The test to be applied to determine whether there was wrongful continuance of an arrest is the same as that applicable to wrongful arrest, *ie*, *mala fides* or *crassa negligentia* implying malice: see *The Margaret Jane* (1869) LR 2 A & E 345. **In my judgment, the plaintiffs' refusal on 14 March 1988 to accept the letter of undertaking amounted to at least malicious negligence.** The arrest was clearly continued unnecessarily. The plaintiffs are therefore liable for damages for the continued detention of the vessel from 14 to 15 March 1988.
>
> (emphasis added)

[93] I accept that this case is not only simply a case with "so little foundation", it is in fact a case with "no foundation" at all. Instead, it is a case which the plaintiff knew or ought to have known was based on a false foundation and a second bite of the cherry after it failed in the Durban High Court.

[94] In the premises, it is the judgment of this court that the plaintiff should be ordered to pay for the damages occasioned by the wrongful arrest of the defendant's vessel.

Conclusion

[95] In the light of my findings and conclusions above, I hereby grant to the defendant the following orders:

(i) the writ *in rem* and warrant of arrest both dated 31 July 2023 be set aside in this action;

(ii) the vessel "Alpine Mathilde" (IMO No:9380506) registered at the Port of Hong Kong be immediately released from arrest in this action;

(iii) a declaration that in the circumstances of the case, this court has no *in rem* jurisdiction over the defendant in respect of the subject matter of this suit and/or the relief or remedy sought in this action;

(iv) all and any vessel's statutory documents, taken by the plaintiff or sheriff from the vessel during the arrest of the vessel on 31 July 2023 for safekeeping, shall be returned to the solicitors for the defendant within 24 hours from the date of the order to be made herein;

(v) the plaintiff do pay to the defendant damages for wrongful arrest and/or wrongful continuation of arrest of the defendant's vessel together with damages for wasted expenses, such to be assessed by the High Court Deputy Registrar;

(vi) the plaintiff to pay the defendant costs fixed at RM25,000 subject to payment of allocatur.